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May 31, 1991

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: CERCLA Section 122(e)(6) Issues

FROM: Larry Starfield
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TO: Tim Fields, Deputy Director
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THRU: Earl Salo
Assistant General Counsel
for Superfund (LE-132S)

SWERO SC's/SA's, E. Furey, T. Bramigan, J. Breslin, M. Butler - good discussion of "remedial" and "remedial" as these terms may be interpreted under CERCLA - See esp. fn 2 - p. 3.

Attached are draft comments I prepared in response to an inquiry from Region 5 concerning the proper use of CERCLA section 122(e)(6). That section provides that once an RI/FS has been initiated, PRPs may not perform work at a CERCLA site unless authorized by EPA. The scope of the section was discussed in detail several years ago in the context of resolving overlapping cleanup plans by State and Federal authorities. (See 54 Fed.Reg. at 10523 (March 13, 1989).) The Region's questions raise important legal and policy issues. Please let us know your views on the use and scope of the section 122(e)(6) process.

Attachment

DRAFT

ATTORNEY WORK PRODUCT
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May 28, 1991

MEMORANDUM

SUBJECT: CERCLA Section 122(e)(6) Issues

FROM: Larry Starfield
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TO: Tom Jacobs
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EPA Region 5 (5CS-TUB-3)

THRU: Earl Salo
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for Superfund (LE-132S)

This memorandum sets out my thoughts on Bertram Frey's memorandum of May 8, 1991, requesting an EPA OGC Advisory Opinion regarding several CERCLA section 122(e)(6) issues. After you have had an opportunity to review this response, we should discuss the advisability of issuing a formal OGC opinion on the subject; note that such an opinion may serve to limit the Agency's flexibility in future cases.

> ISSUE #1. What activities, if any, performed by a non-federal party pursuant to a state court decision ordering a state law cleanup at an NPL site for which a final RI/FS has been prepared, constitute "remedial action" under CERCLA section 122(e)(6) such that authorization of the President [/EPA] is required?

SUMMARY: We have attempted to interpret the term "remedial action" in CERCLA section 122(e)(6) as broadly as possible, to include all PRP cleanup activities (including those performed under State order) that arguably come within the expansive statutory definition of "remedial" action. A broad reading is important because it maximizes EPA's ability to require prior authorization for PRP actions (and thus to control work and

minimize conflicts), and it serves to give effect to the legislative intent underlying the provision. Due to the fact that the definitions of "removal actions" and "remedial actions" overlap to a large degree, many actions that might be argued by PRPs or States to be "removal" could come within the authorization provision; this would generally include on-site, physical activities that would be inconsistent with EPA-planned work, and not studies or design work.

DISCUSSION:

A broad reading of the term "remedial action" in section 122(e)(6) is appropriate for several reasons.

First, the statutory definition in CERCLA section 101(24) broadly defines "remedial action" to include "those actions consistent with permanent remedy taken instead of or in addition to removal actions ... to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." The definition specifically includes storage, confinement, neutralization, cleanup of released hazardous substances and associated contaminated material, recycling, on-site treatment or incineration, and monitoring to ensure that the actions are protective of health and the environment. Most cleanup actions that might be taken by a PRP would arguably fall within one of those categories, even if such action could also be said to come within the broad definition of a "removal action" in CERCLA section 101(23).[1] Indeed, in the only published interpretation of CERCLA section 122(e)(6), the Agency concluded that the term "remedial" action is broad enough to encompass actions taken under other statutes, such as corrective actions under RCRA (many of which might also come within the definitions of both remedial and removal actions). See 54 Fed.Reg. at 10523 (March 13, 1989).

Second, the broad reading of the term "remedial action" in

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[1] "Removal" actions are defined in CERCLA section 101(23) to include "the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment." The NCP specifically notes that removals may include the excavation and off-site disposal of drummed waste, the diversion of runoff, the closure of a lagoon, or the capping in-place of contaminated soil (40 CFR 300.415(d) (1990)).

section 122(e)(6) is supported by the title of that section itself -- "Inconsistent response action." The use of the term "response" rather than the term "remedial" to modify the type of action to which the section applies, arguably evidences a broad Congressional intent to prohibit most response action that are inconsistent with EPA's remedial action ("response" actions include both remedial and removal actions, see CERCLA section 101(25)).[2] This would apply both to actions taken by PRPs voluntarily, and those taken by PRPs under State or local order.[3]

Third, a broad interpretation of "remedial action" is consistent with the intent of the provision, as expressed by Senator Mitchell, one of the conferees on the SARA Conference Report: "This [section] is to avoid situations in which a PRP begins work at a site that prejudges or may be inconsistent with what the final remedy should be or exacerbates the problem." 132 Cong. Rec. S 14919 (daily ed., Oct. 3, 1986) (emphasis added).[4] The purpose of the section was also viewed broadly by the district court in Allied Corp. v. Acme Solvents Reclaiming, Inc.:

> Section 122(e)(6) protects the public by safeguarding the EPA's authority to direct the course of the cleanup once the

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[2] It is not unusual for Congress to use the term "remedial" in an imprecise manner where the intent was to cover both removal and remedial actions. For example, section 121(e)(1) (the permit exemption) refers to both remedial and removal actions in the first clause, but refers to only "remedial" actions in the second.

[3] The Agency has taken the position that the authorization requirement in section 122(e)(6) applies to "any remedial actions taken by a PRP, including those actions ordered by a State, as both types of action could be said to present a potential conflict with a CERCLA-authorized action." 54 Fed.Reg. at 10523 (emphasis added). (Note that there is no legislative history on the section's specific application to State-ordered actions.)

[4] Congress' intent that CERCLA actions should proceed without potential conflict with other cleanup actions is also suggested by the language in section 7002(b)(2)(B) of RCRA, which states that RCRA citizen suits alleging an imminent and substantial endangerment may not be brought if EPA: (a) has commenced an action under CERCLA section 106 (or RCRA 7003); (b) is engaging in a removal action under CERCLA section 104; (c) has incurred costs to begin an RI/FS under CERCLA and is diligently proceeding with remedial action; or (d) or has obtained a court order (including a consent decree) or issued an administrative order under CERCLA section 106 or RCRA 7003, and a responsible party is diligently conducting a removal, an RI/FS, or proceeding with remedial action pursuant to that order.

EPA becomes involved in such cleanup.

691 F.Supp. 1100, 1113 (N.D. Ill. 1988).[5]

There will certainly be disputes over whether response actions taken by PRPs (or ordered by States) constitute "remedial actions" within the meaning of section 122(e)(6), or whether they are more appropriately termed "removals." However, the Agency is generally afforded considerable deference in interpreting the definitions within CERCLA; an expansive interpretation of "remedial" can be justified in light of the Agency's strong interest in having a process for resolving inconsistent response actions at CERCLA sites. As noted above, many actions that could be characterized as "removals" present the same threat of inconsistency and disruption as do actions that are traditionally described as remedial actions.[6] A narrow reading of section 122(e)(6) that would allow PRPs to disrupt EPA remedies by characterizing their actions as "removals," would create a loophole that could serve to nullify the effect of section 122(e)(6).

We would generally expect those removal actions that involve on-site physical activities to be candidates for the authorization process; however, studies or design work that do not present a credible threat of inconsistent action, would generally not come within section 122(e)(6).[7] (See Allied Corp. v. Acme, 691 F.Supp. at 1110 n. 7, where the court differentiated between "remedial actions" and "projects and plans.")

In cases where the Agency agrees (or a court holds) that a PRP action is properly described as a removal action for the purposes of section 122(e)(6), the Agency may still have mechanisms available to prevent the action from proceeding, if

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[5] Note that this opinion is not consistent with the Agency's view of section 122(e)(6) on all points.

[6] In addition, the Conference Report on SARA notes that section 122(e)(6) is merely intended to "clarify" that no PRP may undertaken any remedial action unless such action has been authorized by the President. H.R. Rep. 962, 99th Cong., 2d Sess. at 254 (1986); see also 132 Cong. Rec. S 14919 (daily ed. Oct. 3, 1986). If, indeed, section 122(e)(6) is simply a clarification of the law as it existed under the original CERCLA statute, then the principle of no inconsistent PRP actions likely applies to removal as well as remedial actions. (But see Allied Corp. v. Acme, 691 F.Supp. at 1108, 1108 n. 6, and 1111.)

[7] The definition of "removal" in CERCLA section 101(23) includes studies and investigations undertaken pursuant to section 104(b).

that action is deemed to be inconsistent with EPA plans. Where a PRP is acting under a state order, the use of the Federal supremacy or implied preemption theories can be evaluated. Where a voluntary PRP action may conflict with EPA activities, it may be appropriate to examine the use of authorities under CERCLA section 106 to limit the PRPs' activities at the site, in addition to the Federal supremacy and implied preemption arguments.

ISSUE #2: When may the President authorize remedial action under section 122(e)(6)?

SHORT ANSWER: At any time after the start of the RI/FS, the President may authorize PRPs to proceed with remedial action at the site. This may occur, for example, where a State orders a PRP to proceed with the closure of a hazardous waste landfill under RCRA, or to complete a solid waste landfill closure under State law.

DISCUSSION:

The authorization mechanism of section 122(e)(6) provides the Agency with the flexibility to allow PRP cleanup actions (including those taken pursuant to an order issued under RCRA or State law) to continue in cases where action is proceeding appropriately, and where such actions would not disrupt a CERCLA response. Such an approach helps to avoid duplicative and wasteful cleanup actions.

The earliest point at which such authorization may be given is immediately after the start of the RI. At that point, the Agency is usually 1-2 years away from selecting the final remedy for the site, and thus it may be difficult to know which actions would be inconsistent with the remedy that will ultimately be chosen. However, it is also difficult to argue that current cleanup work is inconsistent with remedial work that EPA "may" undertake someday, at least in terms of a physical conflict or inconsistency.

The Agency may decide that PRP actions are inconsistent with EPA remedial action plans where, e.g., a State is planning to build a cap over a site for which EPA is studying treatment alternatives; there, the Agency might decide that the State action could complicate any treatment remedy (if chosen). In other cases, where the State's approach appears to be a sound one (e.g., where a State is already proceeding with the closure of a hazardous waste landfill under RCRA, or of a solid waste landfill under State law), the Agency could decide to allow the action to continue in order to avoid duplication. In fact, the Superfund cleanup could be put on hold while the State action proceeds. A very streamlined RI/FS could then be performed <u>after</u> the State

action is completed to determine if any Superfund action is necessary; if not, a no-action ROD could be issued and the site deleted from the NPL. This approach was taken recently at the Ilco site in Region 3. (See memorandum of Don Clay, attached.)

Similarly, where a PRP sought to come on site and remove barrels of waste to a permitted, off-site treatment or disposal facility (an activity that arguably comes within the statutory definition of "remedial action" as well as that of "removal action"), the Agency might well decide that the action would be consistent with EPA's plans to clean up the site, and thus the Agency might issue a letter authorizing the activity under section 122(e)(6).

It is important to note that an authorization to proceed does not constitute an approval of work, or a concurrence. The NCP specifically states that the written concurrence of the Assistant Administrator for Solid Waste and Emergency Response or the Regional Administrator is necessary before concurrence may be presumed for state-lead actions (40 CFR 300.515(e)(2)(ii) (1990)). EPA may wish to adopt a similar policy for PRP actions. Further, the authorization can be withdrawn if and when EPA determines that an inconsistency occurs.[8]

The Region's memorandum takes the view that "there may be no pre-ROD authorization of a remedial action," on the theory

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[8] Model language should be prepared to help address the estoppel concern associated with authorization letters from EPA. The following represents one possibility:

> I have reviewed the State's order requiring ___ [the PRPs] to perform certain cleanup actions at the ___ Site, at which an RI/FS has been [started/secured] by EPA. Pursuant to your request, and CERCLA section 122(e)(6), and based on currently available information, I am authorizing the PRPs to proceed with the State-ordered cleanup actions at the Site at this time. This authorization is in recognition of State work at the Site, but does not constitute EPA concurrence on any or all work to be performed by the PRPs at the Site. The Agency has not reviewed the work plans in the depth that would be necessary to make such a judgment. As the National Contingency Plan regulations note in the context of Superfund contracts and cooperative agreements with states, "[u]nless EPA's Assistant Administrator for Solid Waste and Emergency Response or Regional Administrator concurs in writing with a state-prepared ROD, EPA shall not be deemed to have approved the state's decision" (40 CFR 300.515(e)(2)(ii)); in this case, neither the Assistant Administrator for OSWER nor the Regional Administrator has concurred on any State decision document or PRP work plan.

that no "consistency" finding can be made, or authorization granted, until the Agency knows what its remedial action will be (i.e., after ROD signature). I disagree with this statement to the extent that it suggests that such a conclusion is compelled by the statute. Section 122(e)(6) clearly provides that EPA may authorize remedial actions to proceed at any time after the RI/FS has commenced.

I also question the Agency's ability to successfully defend an unequivocal statement that there may be no section 122(e)(6) authorization prior to ROD signature. Section 122(e)(6) implies that some showing of inconsistency is necessary before authorization to proceed is denied. Especially in the case of State-ordered PRP actions, I believe it will be difficult to convince a court that a State's plan to properly clean up a site, e.g., to treat waste from a lagoon under appropriate RCRA regulations, is inconsistent with an EPA remedy that is several years from even being developed.

I also disagree with the statement to the extent that it suggests that there are no situations in which the authorization option could appropriately be exercised as a policy matter. In emergency or time critical situations, it may be very appropriate to authorize PRPs to take certain remedial actions (in the broad sense of the term). Further, as discussed above, where PRPs are acting pursuant to a State order and under State law, it may be appropriate to authorize the PRPs to comply with the order where the work would not be inconsistent with EPA plans. It is important to stress that EPA is not "selecting" a remedy by using section 122(e)(6) -- the Agency is simply allowing a PRP or State remedial action to continue.

Of course, the Agency may decide that it is sound policy not to authorize PRPs to conduct non-time critical actions at NPL sites prior to the signature of the ROD, except when acting under a Federal (or State) order. Such a policy would reduce any perception that section 122(e)(6) is being used to circumvent the public participation process in CERCLA and the NCP.

ISSUE #3: To whom is authority delegated to provide authorization under CERCLA section 122(e)(6)?

SHORT ANSWER: Presumably, the Regional Administrator.

DISCUSSION:

There is no formal delegation of authority for section 122(e)(6) in the Delegations Manual. However, since the Regional Administrator has been delegated the authority "to determine the necessity of, to select, and to perform the appropriate remedial action" for a site (Delegation 14-5), he presumably has the

authority to authorize other work to move forward while his remedy is being developed or implemented. On that theory, the authority could be re-delegated by the Regional Administrator to the same extent that remedy selection may be (i.e., to the Deputy Regional Administrator). We may want to revise the delegations to eliminate any ambiguity on this point.

Attachment

cc: Tim Fields, OERR (OS-200)
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